In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1163

SUPREME DASH, ET AL., PETITIONERS

v.

THE COMMANDING GENERAL, FORT JACKSON, SOUTH CAROLINA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 22–23) is reported at 429 F. 2d 427. The opinion of the district court (Pet. 25–40) is reported at 307 F. Supp. 849.

JURISDICTION

The judgment of the court of appeals was entered on September 2, 1970. On November 23, 1970, the Chief Justice extended the time for filing the petition for a writ of certiorari to December 28, 1970, and it was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, servicemen stationed at Fort Jackson, South Carolina, were denied their First

Amendment rights by the Post Commander's refusal to allow them to hold a meeting on-post to discuss "legal and moral questions relating to the war in Vietnam and to the civil rights of American citizens both within and outside the armed forces."

2. Whether a Fort Jackson Regulation that prohibits distribution of unofficial publications on the post without the prior approval of the post commander—which approval is to be granted or denied under the standards of the pertinent Army Regulation—is valid under the First Amendment.

STATEMENT

Petitioners were all servicemen stationed at Fort Jackson, South Carolina, when this action was commenced (A. I. 3-4).

Fort Jackson Regulation TC 600-50 requires that approval must be obtained from the post commander before pamphlets, handbills, etc., may be distributed on the post (Pet. 21). In December, 1968, petitioner Cole was discovered distributing copies of Short Times, a newspaper published by servicemen at Fort Jackson, in his barracks. The post commander had not approved distribution of the newspaper; it does not appear that any request for permission to do so was made. Cole's copies of the newspaper were taken from him and he was ordered to stop distributing it. Cole was restricted for a short time as a result of this incident (A.I. 84, 133-134).

In January, 1969, a number of soldiers at Fort Jackson began meeting informally in the barracks to discuss their opposition to the war in Vietnam, racial

problems, and other topics of current interest (A. II, 265). Out of these meetings grew an organization named "G.I.'s United Against the War in Vietnam" (A.I. 103–104). Although the commanding officer of the company knew about these meetings, he did nothing to interfere with them (A.I. 20).

In February, GI's United began to circulate a petition requesting the permission of the post commander to hold an open meeting on Fort Jackson to discuss the war in Vietnam, civil rights of citizens both within and outside the military, and the confinement of three soldiers at Fort Jackson. The petition also stated that a purpose of the meeting would be to draw up a petition to present to Congress and the Department of the Army expressing the attitudes of those soldiers attending the meeting toward the war in Vietnam (A.I. 14–15). The petition was freely circulated (A.I. 47–48).

On Monday, March 3, 1969, two of the petitioners herein, Cole and Dash, attempted to present the signed petitions to the Post Commander. They were directed to the Staff Duty Officer, Major Smith, who refused to accept the petitions on the ground that the Army does not recognize collective bargaining (A.I. 26, 31, 107–108). No Army official read the petition at this time (Pet. 4). The Commanding General, Fort Jackson, later examined the petition and stated that had he seen it, he would have denied it on the grounds that it would have jeopardized good order and discipline at Fort Jackson (A.I. 35).

On the evening of March 20, 1969, petitioner Ruddr decided to hold a meeting of GI's United on the

lawn in front of the barracks (A.II. 10–12, 249). A small crowd gathered on the lawn and attracted the attention of some 100 to 200 of those inside the building, some of whom were hanging out of the windows (A.I. 21; A.II. 11). Those on the lawn began to speak to this crowd of spectators about the war in Vietnam, and social conditions in America (A.II. 13–16, 25). The crowd responded, yelling both in agreement and disagreement (A.II. 15, 53–54). When the brigade duty officer attempted to end the meeting, the crowd did not obey his order immediately, and disrespectful comments were made to him (A.II. 39–41).

One of the speakers told the men to "Bring your minds, bodies, and souls and march with us," referring to a march in Atlanta (A. II. 26). Someone else said, "Why should we serve and fight someone else's war in Vietnam. If they refuse to end the war in Vietnam then we can in the military" (A.II. 32). Lieutenant Austin reported that when he arrived on the scene the "men seemed to have worked themselves into a * * * state of frenzy, uncontrolled * * *" (A. II. 51). Petitioner Pulley stated, "This is the way they teach us to salute officers in the Army; and this is the way we salute officers"; he then gave the black power salute (A. II. 37). Obscene remarks were made, questioning the authority of the lieutenant and expressing hostility to the Army in general (A. II. 52, 55). At some point a few bottles and cans were thrown out the window (A. II. 55).

After military authorities investigated the incident, charges were preferred and a number of petitioners were placed in restraint (A. I. 21–22). A pre-trial

investigation (A. II.) concluded that a prima facie case existed with respect to most of the charges but that the evidence on the charges of disrespect to a superior officer and breach of the peace was insufficient (R. Govt. Exh. A). The investigating officer recommended that the accused should be administratively discharged as unfit for further service (R. Govt. Exh. A). Three of the four accused were administratively discharged (A. I. 183).

On March 10, 1969, paragraph 5–5, Army Regulation 210–10, was published; it limited the authority of installation commanders to restrict the distribution of publications on their posts to situations where the distribution would present "a clear danger to the loyalty, discipline, or morale of troops" there. Under that regulation, a commanding officer must obtain approval from Headquarters, Department of the Army, before prohibiting distribution of a publication; distribution may be delayed, however while such approval is sought (Pet. 19–20).

On April 1, 1969, petitioners initinted this action, seeking a declaratory judgment that they have a constitutional right (1) to hold public meetings on Fort Jackson for the discussion of current issues and (2) to prepare and present petitions of grievances to the Commanding General and to the Congress of the United States; and that Fort Jackson Regulation TC 600–50, insofar as it requires prior approval of the commanding officer to be obtained before publications may be distributed on post, conflicts with the First Amendment (A.I. 3–13).

Both sides moved for summary judgment (A.I. 18, 78–79). The district court granted the government's motion (Pet. 40). The court stated:

> * * * it would appear plain from the foregoing general principles that, within certain limits, the military establishment should have authority to restrict both the distribution of printed materials and the holding of public discussion meetings on post. The right to restrict, however, must no doubt be kept within reasonable bounds: it is not, and cannot be, a completely limitless power. And, however hesitant they may be to "intrude", Courts will be available to determine whether there is a reasonable basis for such restrictions as may be placed on the serviceman's right of free speech by the military establishment [Pet. 34].

The court then found that there was a reasonable basis for denying permission to hold an open meeting to discuss the war:

> * * * In my opinion, the denial of the right for open, public meetings at advertised meetings on post for discussion of the propriety of the political decision to participate in the Vietnam war was justified "by reason of the peculiar circumstances of the military" and represented no infringement of the constitutional rights of the plaintiffs or others similarly situated. * * * They sought to generate, through their meeting, such discontent with the Vietnam war among servicemen that the political decision to involve this nation in such war might be influenced, if not reversed. This they may have a constitutional right to do off base and as individual citizens, despite the fact that

they were members of the armed services. But this is quite different from their right to organize on base among military men meetings to promote discontent with their military responsibilities and tasks [Pet. 38].

The court held that Fort Jackson Regulation 600–50, read in conjunction with an opinion of the Judge Advocate General advising local Judge Advocates and post commanders of his interpretation of AR 210–10,[1] is constitutional (Pet. 36). The court found that there had been no exercise of authority under this regulation; that the question of whether there had been a proper exercise of such power could be decided only when a specific instance arose (Pet. 34–36).

The court of appeals affirmed on the opinion of the district court (Pet. 24).

ARGUMENT

1. It is well established that the right of assembly may be restricted where sought to be exercised upon government property, if a valid governmental interest justifies the restriction, and if the traditional places for speech and assembly, such as sidewalks and public parks, are not involved. *Adderley* v. *Florida*, 385 U.S. 39; *Cox* v. *Louisiana*, 379 U.S. 559. A military post is not a public place, and the military has a right to impose some restrictions on assemblies within the post. In addition, a state may, given a valid justification, impose restrictions on the speech of its

[1] While an advisory opinion of the Judge Advocate General is not a command to junior officers, it does have authoritative effect. The Adjutant General of the Army had also issued a policy guidance letter embodying the same interpretation. Pet. App. D, p. 35 n. 20.

employees that it could not impose on the citizenry in general. *United Public Workers* v. *Mitchell*, 330 U.S. 75; *Goldwasser* v. *Brown*, 417 F. 2d 1169 (C.A. D.C.), certiorari denied, 397 U.S. 922; cf. *Pickering* v. *Board of Education*, 391 U.S. 563; *Tinker* v. *Des Moines Independent School District*, 393 U.S. 503. Where, as in this case, the government seeks to restrict the right of assembly by military personnel on a military post, the only remaining question is whether the particular restriction is justified by the commander's assessment of the requirements of morale and discipline in the unit involved. The district court's conclusion that the restrictions in this case were justified has ample support in the record; there is no occasion for further review.

2. Since petitioners never applied for permission to distribute their publication on the post, the only question raised with respect to this aspect of the case is the validity on its face of the Fort Jackson regulation requiring prior approval for distribution of printed material on post. Fort Jackson Regulation TC 600–50 is a local application of Army Regulation 210–10, Par. 5–5.[2] The Army Regulation provides:

> * * * [I]nstallation commanders will not, except as provided in this paragraph, take action to control or restrict the dissemination of publications, even if such publications are believed to be in poor taste or unfairly critical of Government policies or officials. The installation commander will be guided by the principle that, except in cases in which a publication consti-

[2] Both regulations are reprinted in Appendix A to the petition.

tutes a clear danger to military loyalty, discipline, or morale, military personnel are entitled to the same free access to publications as are other citizens.

These standards are sufficient to guide the commander's action in determining whether to grant permission for distribution of publications on a military post. Cf. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 893 (restriction phrased in terms of "good order and military discipline"). In the military context in which this case arises, it is difficult to see how more specific standards could have been drafted. Consequently, the regulation is valid on its face; the validity of its application to any particular situation will have to await future cases in which applications for permission to distribute under the regulation have been made and denied. See, for example, the pending petition for a writ of certiorari in *Yahr* v. *Resor*, No. 1164, this Term.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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